IN THE

Supreme Court of the United States

No.....

AUGUSTA M. TURNER,

Petitioner,

v.

CARL A. LUER, WILLIAM J. LUER, HERMAN F. LUER,

Respondents,

ALTON BANKING AND TRUST COMPANY, a Corporation, Executor of the Last Will and Testament of AUGUST LUER, Deceased,

Intervening-Respondents.

BRIEF IN SUPPORT OF PETITION.

No Consent From Beneficiaries for Destruction of Trust.

The respondents admit all the circumstances surrounding the execution of the trust instrument by their father in February, 1930.

August Luer arranged a meeting so that he could inform all the children of his plan and presented them with the trust instrument which they all read; then it was signed by him and the three sons, the respondents, as trustees.

Two years and ten months later the settlor, with the co-operation of the three respondents, destroyed the trust instrument and the duplicate copy.

Strange dealings—to destroy all of the documentary evidence, the "why" of which was not answered by the respondents.

The destruction of the instruments cannot be asserted to be consistent with honest dealings or justifiable purpose. They should have been preserved by the trustees for benefit of *cestui que* trusts, if the *contra* were true.

If all beneficiaries were agreeable and sui juris, of course they could have agreed with the father to terminate the trust. However, there is no evidence in the record showing consent to or even knowledge of the destruction of the trust instrument.

This is the crucial point of the facts of this case.

All of the original beneficiaries were living in December, 1932, when the trust instrument and all copies were destroyed. They were the three sons, the petitioner, the other daughter, the settlor's wife, and the nine children of the five beneficiaries.

The record reveals that the trustees were to pay the income to the father for his life, afterwards to his widow for her life, and then divide the corpus between the five children and/or the lineal descendents of any deceased child.

Therefore, to have legally terminated the trust in December, 1932, or January, 1933, the trust settlor, father, would have had to secure the consent of all the beneficiaries, including contingent remaindermen; otherwise, by common law and local applicable law, the trust still is valid.

Botzum v. *Havana Nat. Bank* (1937), 367 Ill. 539;

May v. *Marx* (1939), 300 Ill. App. 144; 20 N. E. (2d) 821;

Sutliff v. *Aydelott* (1940), 373 Ill. 633; 27 N. E. (2d) 529; 131 A. L. R. 457.

Neither the respondent's answer alleges nor does the evidence show any consent from the 1) settlor's other daughter, 2) from his wife or 3) from the contingent remaindermen. (No citations can be given because the record is silent.)

The petitioner denied that she gave her consent or had knowledge of the destruction, but the Court ruled she was estopped to so assert or prove the existence of a valid trust.

Nevertheless, if the Court had correctly applied the local law that the trust is presumed to be irrevocable, then, since there was no proof that *all beneficiaries* had joined in the termination, the decision would have been that a valid trust still was in existence.

The Decision Resurrects the Repudiation Doctrine of Swift v. Tyson.

It Will Establish Again a Basis for Discrimination by Non-Citizens Against Citizens, Create Uncertainty and Render Impossible Equal Protection of the Law.

In the instant case the federal courts determined that:

(1) The Luer trust instrument is presumed to be revocable;

(2) The burden was upon petitioner to prove that the trust was irrevocable by its terms, and that

(3) The local law that a trust is presumed to be irrevocable can be disregarded by a federal court, who may freely apply their independent judgment, thus establishing in the Seventh Circuit an unwritten "general law" *contra* to the common law and local law of trusts and to the statutes of the United States and the decisions of this Court, as will be discussed hereinafter.

The Decision of the Circuit Court Thus Creates a Transcendental Body of the Law of Trusts Outside of Any Particular State But Obligatory Within the Seventh Circuit.

Thus, individual citizens willing to move from their own state and become citizens of another might so avail themselves of this federal rule, and without even a change of residence, a corporate citizen of the state (who was a trustee) could avail itself of the federal rule by re-incorporating under the laws of another state, as was done and permitted in the *Taxicab Cases*[4] when the doctrine of *Swift* v. *Tyson* was in effect.

The trust was created in Illinois, the settlor and trustees were all residents of Illinois, and the seat of the trust property was there.

Under the law of Illinois, a trust which has been perfectly created cannot be revoked unless the power of revocation has been reserved.

Harris Trust & Savings Bank v. *Morse*, 238 Ill. A. 232;
Williams v. *Evans*, 154 Ill. 98;
Hubbard v. *Buddemeier*, 328 Ill. 76.

In the Opinion, this law was ignored without comment. (R. 251 to 256)

The local law of trusts places upon the trustee-respondents the burden to show that August Luer had the power to revoke the trust.

Dobroth v. *Jensen*, 348 Ill. 167.

This they failed to do. There is neither testimony nor documentary evidence in the records to show that August

[4] *Black and White Taxicab and Transportation Co.* v. *Brown and Yellow Transfer Co.*, 276 U. S. 518—48 S. Ct. 404, which case applied the doctrine of *Swift* v. *Tyson*, 16 Pet. 1, 18, 10 L. Ed. 865 which has been since overruled by *Erie R. Co.* v. *Tompkins*, 304 U. S. 64—58 S. Ct. 817.

Luer had any reserved power to revoke the trust. Consequently, he could not have revoked the trust by destroying the instrument.

William v. *Evans,* 154 Ill. 98.

This is particularly true in view of the fact that August Luer and the trustee-respondents had destroyed the trust instrument, and the burden was upon them to overcome the presumption arising from the doctrine of despoiler of the evidence.

Hudson v. *Hudson,* 287 Ill. 286;
Nofftz v. *Nofftz,* 290 Ill. 36.

Circuit Court Ignores Erie R. Co. v. Tompkins. Resurrects the Repudiated Doctrine of Swift v. Tyson.

The Circuit Court has departed from the rule of this Court as stated in *Erie R.* v. *Tompkins, supra,* and resurrects the repudiated rule of *Swift* v. *Tyson, supra;* and we find that the Circuit Court, in its Opinion establishes a strange doctrine of the law of trusts—an unwritten "general law" heretofore condemned by this Court and in conflict with the decisions of other federal courts and in direct conflict with the law of Illinois (see Illinois citations above). The Circuit Court affirmed the District Court and held

> (R. 253) "* * * the plaintiff failed to establish her allegation of irrevocability of the trust."
>
> (R. 252) "It may be such a trust they could not terminate on agreement, but I have no evidence it was such a trust instrument as that."

The Circuit Court gives neither citations nor legal reasoning and ignored the citations in the briefs of petitioner.

There can be only one conclusion and that is, *the Circuit Court of the Seventh Circuit has used its independent judgment in the field of trusts and seeks to establish a new rule of unwritten "general law" of trusts.*

Should this Court fail to grant this petitioner's writ and review and correct this decision, then the rule of *Erie R.* v. *Tompkins, supra,* will be undermined and the rule of *Swift* v. *Tyson, supra,* again will come to life.

The constitutional doctrine announced by this Court in *Erie R. Co.* v. *Tompkins, supra,* is still fresh in the minds of all. That case holds that

1) There is no unwritten "general law" or transcendental body of law outside of any particular state;

2) Federal courts do not have the power to use their judgment as to when to apply the rules of common law;

3) In federal courts, except in matters governed by federal constitution or by acts of Congress, the law to be applied in any case is law of the state[5];

4) The unwritten "general law" doctrine of *Swift* v. *Tyson* is unconstitutional and is overruled.

This decision of the Seventh Circuit offends not only the decision of this Court in *Erie R. Co.* v. *Tompkins, supra,* but also the reasonings of the host of legal writers[6] who supplied the background relied upon by this Court as the basis for the overthrow of the repudiated reasoning in *Swift* v. *Tyson, supra.*

It has been held by this Court that under the rule in *Erie R. Co.* v. *Tompkins, supra,* state law is applicable to all cases except in matters governed by the Federal Constitution or by acts of Congress and treaties. *Board of Com-*

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[5] Section 34 of Federal Judiciary Act of September 24, 1789, c. 20, 28 U. S. C. A. Sec. 725, and *Erie R. Co.* v. *Tompkins.*

[6] See footnotes to *Erie* v. *Tompkins* in 58 S. Ct. at pages 818 to 822, Incl. Even the Congress considered bills to change the effect of the decision in *Swift* v. *Tyson* and to mitigate its discrimination.

missioners v. *United States,* 308 U. S. 343, 60 S. Ct. 285; 84 L. ed. 313.

The rule was held applicable to suits in equity. *Richlin* v. *New York Life Insurance Co.,* 304 U. S. 202, 58 S. Ct. 860, 81 L. ed. 1290.

Estoppel and Competency of Petitioner to Testify.

This suit was commenced (R. 2) by suit against the three individual respondents as "trustees" of a voluntary trust created by a trust instrument signed by August Luer and the three trustees.

The settlor is now deceased and the Alton Banking and Trust Company is the executor of the last will and testament of the settlor and as such it intervened in this action between petitioner and three individual respondents. (R. 38)

In its capacity as Executor, the bank urged upon the District Court that neither the petitioner nor her husband were competent as witnesses under Chap. 5, Ill. Rev. Stat. 1943, Pars. 1, 2, 3, 4, and 5, on the theory that since their intervention, the suit was now against them as the Executors of the Estate of August Luer. (R. 98, 99, 100)

The Court heard the testimony (R. 101). However, the Opinion indicates that the Court disregarded petitioner's testimony and allowed the objection made to her competency as a witness. The Court held petitioner was estopped to now assert the existence of a valid trust. (R. 233)

The rule concerning evidence to prove lost documents has been settled by this Court in *Tayloe* v. *Riggs,* Pet. 591, 6 L. ed. 140.

> "Where it is proven that instrument is destroyed, the party may read a counterpart, or if no counterpart, an examined copy, or if no such copy, *may give parole* evidence of the contents." (Italics supplied)

In its capacity as Executor, the bank also urged in their argument to the Circuit Court that there was an "Estoppel of Record" operative against the petitioner.

The theory of the "Estoppel of Record" being that the petitioner did not object to the sale by the Executor and the purchase by Herman F. Luer of certain corporate stocks on July 26, 1943, and, therefore she is now "estopped" to establish a trust against and secure an accounting from Herman F. Luer and his brothers, because the corporate stock purchased by Herman F. Luer was the same stock once a part of the corpus of the trust. (R. 11, 66)

As Executor the bank urged that the petitioner does not have "clean hands" because, it asserts, she did not object to the sale to Herman F. Luer.

Let us examine the record.

1) Herman F. Luer admits in his answer that in February, 1930, he became a trustee under the Luer trust. (R. 7, 8)

2) Herman F. Luer admits in his answer that in January, 1933, at the request of the settlor, August Luer, he transferred these corporate stock from *his name as trustee* to the name of the settlor. (R. 11)

3) April 3, 1943, or a date later, petitioner filed a motion to intervene and vacate a judgment in a local action in which Herman F. Luer was a party and in which motion the petitioner sets out the existence of the trust with Herman F. Luer as one of the trustees of the property of August Luer. (R. 31 to 36)

4) Herman F. Luer is a stockholder, officer and director of the Alton Banking and Trust Company, the Executor. (R. 4, par. 10, R. 11)

5) July 26, 1943, Herman F. Luer, as an individual, purchased from the Alton Banking and Trust Company, (of which bank he is an official), these corporate stocks. (R. 66)

6) September 27, 1943, petitioner filed her suit in the Federal District Court against Herman F. Luer and

his two brothers to establish the trust admittedly created February 17, 1930, and for an accounting. (R. 6)

7) Herman F. Luer in his several capacities has known or should have known since February 17, 1930, the true facts concerning the ownership of these corporate stocks.

8) Since April 3, 1943, at least, he has known that the petitioner claimed that he was a "trustee" of a valid trust and that these stocks were a part of the corpus.

9) Now Herman F. Luer is an officer of the bank which says the petitioner is "estopped" to assert the present existence of a trust with Herman F. Luer as trustee thereof because Herman F. Luer as an individual wants to remain safe and secure as the purchaser of corporate stocks from the bank (of which he is an officer). Even though the corporate stocks were once held in his name as one of the trustees of the trust.

The defense of "estoppel" and "clean hands" doctrine is not for Herman F. Luer or the bank to assert.

Herman F. Luer as an individual knew since February, 1930, that these corporate stocks were at one time a part of the trust of which he was a trustee, and at least since April, 1943 he knew that the petitioner claimed they still were a part of the trust. Therefore, when he purchased these same corporate stocks in July, 1943, from the bank of which he was an officer, he was a purchaser with notice, and the defense of "Estoppel of Record" is not available against the petitioner.

However, the Court of Appeals affirmed the District Court which, in its conclusion of law, stated

> (R. 233) "That in any event plaintiff is by her conduct estopped from now asserting the existence of a valid trust."

It appears that the Court applied the "estoppel" and "clean hands" doctrine against the wrong parties.

The doctrine of *laches* cannot be invoked when there is no notice and no injury or, prejudice will not result to the person claiming an estoppel.

United States v. *Dunn*, 286 U. S. 121;
Crimp v. *First Union Trust and Savings Bank*, 185 N. E. 179, 352 Ill 93;
Chadwick v. *Clapp*, 69 Ill. 119;
Continental Commercial Savings Bank v. *Lantry Contracting Co.*, 189 Ill. App. 296.

There can be no estoppel by judgment unless the identity of the parties, the thing to be recovered and the cause of action are the same.

DeMets, Inc. v. *Insull*, 122 Fed. 2d 755;
Harding v. *Harding*, 186 N. E. 152, 352 Ill. 417, 88 A. M. R. 563.

The doctrine of estoppel cannot be invoked as an instrument of fraud and will not be invoked in favor of one who is not an innocent purchaser.

Drain v. *LaGrange State Bank*, 303 Ill. 330, 135 N. E. 780;
Whitlock v. *McClusky*, 91 Ill. 582.

A fiduciary claiming estoppel against a *cestui que* trust must show that he has exercised the utmost good faith in dealing with the *cestui que* trust.

Auer v. *Wm. Meyer Company*, 322 Ill. A. 344, 54 N. E. 2d 394;
Lipscomb v. *Allen*, 298 Ill. 537, 132 N. E. 206.

Everything will be presumed against the despoiler of evidence.

Hudson v. *Hudson*, 287 Ill. 286, 122 N. E. 497;
Nofftz v. *Nofftz*, 290 Ill. 36, 124 N. E. 638;
Anderson v. *Irwin*, 101 Ill. 411.

It must not be overlooked that the trustees co-operated with the settlor, August Luer, in destroying all the copies of the trust instrument, which it must be admitted is an extraordinary performance upon which to base a claim that the trust was legally terminated. Why the respondents (all of whom are officers and directors of a bank) did not desire to preserve the trust instrument thereby enabling them to give a ready accounting of their trusteeship to the beneficiaries, is not explained in the record. If the settlor had a legal right to terminate the trust, that could have been done by a sufficient document which also should have been preserved to show good faith and legality.

The law says "this is your own act and therefore you are not damnified"—estoppel is invoked against a person who prevents a thing from being done. *R. H. Stearns* v. *U. S.*, 291 U. S. 54, St. Ct. 329.

CONCLUSION.

No Federal General Law—Local Law Governs.

Erie R. Co. v. *Tompkins* held that there was no "general law" of torts to be applied by the federal courts independent of the local law which was the law of the case. The decision explicitly overruled the century-old doctrine of *Swift* v. *Tyson* and held that doctrine to be unconstitutional.

Seventh Circuit Resurrects Doctrine of Swift v. Tyson—Disregards Local Law—Applies Its General Law.

The Erie decision was handed down seven years ago. Is it possible that some of the lower federal courts still cling to the doctrine of *Swift* v. *Tyson*?

Are some of the lower federal courts waiting for the doctrine of the Erie decision to be explicitly extended to a case involving the law of trusts and in the meantime follow *Swift* v. *Tyson* and apply their own general law doctrine of trusts?

By the decision in the instant case, the Seventh Circuit is in direct conflict with the Supreme Court in the Erie case, and if the decision is allowed to stand, it will re-establish the doctrine of *Swift* v. *Tyson*.

Illinois Law.

Presumption Trust Is Irrevocable.

The Illinois law is clear and follows the common law:

> "A voluntary trust is irrevocable unless by specific declaration it is made revocable" (131 A. L. R. 457).

The circuit court held:

> (R. 253) "* * * the plaintiff failed to establish her allegation of irrevocability of the trust."
>
> (R. 252) "It may be such a trust they could not terminate on agreement, but I have no evidence it was such a trust agreement as that."

There is neither evidence of record nor finding by the lower court that the trust a) contained any clause reserving any power of revocation, or, b) that August Luer exercised any reserved power of revocation (no citations).

The Court holds (R. 255), contra to local law, that August Luer revoked the trust by destruction of the original and copy and that petitioner has failed to establish that such action on the part of August Luer was without authority and void, and further that petitioner is estopped to prove a valid trust. Therefore, the lower court disregarded the Illinois law of the case and applied its own independent judgment and its own general law in holding:

1) The trust instrument was revoked by its destruction;

2) That August Luer had the authority to revoke the trust;

3) That the burden was upon petitioner, the *cestui que* trust, to prove the action of August Luer without authority and void;

4) That the burden was upon petitioner to prove that the trust instrument contained a clause making it irrevocable;

5) That the petitioner is estopped to prove a valid trust;

The lower court disregarded:

6) The presumption of Illinois law that a voluntary trust is presumed to be irrevocable;

7) The positive rule of law that revocation of a voluntary trust must be reserved in the trust instrument.

8) The rule of law that he who creates a trust estate creates an estate no longer his own;

9) The presumption against the despoiler of evidence.

Thus we have an unconstitutional assumption of powers by the federal courts of The United States which this Honorable Court should not hesitate to correct.

WHEREFORE, that the Writ of Certiorari should be granted is

Respectfully submitted,

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